In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 715

ANTHONY WILKO, PETITIONER

v.

JOSEPH E. SWAN, ET AL., INDIVIDUALLY AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF HAYDEN STONE AND CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, TO BRIEF IN OPPOSITION

The Solicitor General on behalf of the Securities and Exchange Commission, *amicus curiae,* submits the following statement in reply to respondents' first point that the decision below is interlocutory and that the case is "not ripe for review." *Shanferoke Coal and Supply Corp.* v. *Westchester Service Corp.,* 293 U. S. 449, relied upon by respondents below to sustain the jurisdiction of the Court of Appeals, supports both

256455—53

the appealability of the district court's order and the propriety of review in this Court, assuming of course that the issue in other respects warrants certiorari as contended in our main brief. Had petitioner omitted to seek further review of the decision below, or should this Court fail to disturb that ruling, respondents would be in a position to urge that the issue presented by this petition is res judicata in any court proceeding which might follow an arbitration award unacceptable to petitioner. Cf. *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166–7; *United States* v. *Munsingwear*, 340 U. S. 36. In any event, we believe that whether petitioner should be permitted to pursue his statutory remedy under the Securities Act or be relegated to the substitute procedure of arbitration presents an issue which ought to be resolved before, rather than after, a trial on the merits. Certainly petitioner is as much prejudiced by the decision of the Court of Appeals, if erroneous, as respondents were prejudiced by the assumed erroneous holding of the district court. In the *Shanferoke* case, as in the present case, the district court had denied a stay of proceedings pending arbitration but had been reversed by the Court of Appeals. This Court not only upheld the appellate jurisdiction of the

Court of Appeals, but granted certiorari and reviewed the case on the merits.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

ROGER S. FOSTER,
General Counsel,
ALEXANDER COHEN,
Special Counsel,
GEORGE H. JAFFIN,
Attorney,
Securities and Exchange Commission.

MAY 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953